Supreme Court, U.S.
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No. 94-756

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE LONG ISLAND RAILROAD COMPANY,

Petitioner,

v.

JOHN J. MARCHICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH P. ALTIER
PHILIP P. VOGT
(Counsel of Record)
ALTIER & BARASCH
450 Seventh Avenue
New York, New York 10123
(212) 564-9090
Attorneys for Petitioner.

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QUESTION PRESENTED

Was the decision of the Second Circuit consistent with this Court's holding in *Consolidated Rail Corp. v. Gottshall*, No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994)?

PARTIES

Petitioner, The Long Island Railroad Company (LIRR) is a public benefit corporation which is a wholly owned subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York.

Respondent, John J. Marchica, is an individual.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

PARTIES. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT. 4

REASONS FOR DENYING THE WRIT 5

I. The Second Circuit In Its Opinion Relied On The Standard Established By This Court In Gottshall 5

II. The "Floodgates" Argument Presented By Petitioner Is Unbased In Fact And Is Contradictory With The Remedial Purpose Of The FELA 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Consolidated Rail Corp. v. Gottshall, No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994) 1, 4, 5, 6, 7, 8

Marchica v. The Long Island Railroad, 890 F. Supp. 445 (E.D.N.Y. 1992) 2, 5, 6, 7, 8

Urie v. Thompson, 337 U.S. 163 (1949) 7

Statutes:

28 U.S.C. §1291. 2

28 U.S.C. 1294. 2

45 U.S.C. §51 et. Seq. 2

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TO THE HONORABLE SUPREME COURT:

The Respondent, **JOHN J. MARCHICA**, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, **The Long Island Railroad Company.**

OPINIONS BELOW

This case was brought in the Eastern District of New York pursuant to the Federal Employees Liability Act (FELA). On January 26, 1993, the Long Island Railroad's (LIRR) motion for partial summary judgment was denied. *Marchica v. LIRR,* 850 F. Supp. 445 (E.D.N.Y. 1993). After trial, final judgment was entered and the LIRR appealed to the Second Circuit Court of Appeals under 28 U.S.C. §1291 and 1294.

The Second Circuit unanimously affirmed the judgment by opinion dated July 20, 1994. The Second Circuit's opinion as reproduced in the Appendix to the LIRR's petition for Writ of Certiorari.

STATUTE INVOLVED

The statute in issue is 45 U.S.C. §51 et seq. (FELA).

STATEMENT OF THE CASE

On October 25, 1989, John J. Marchica, a LIRR employee, was assigned to weld shut a sidewalk grate to prevent vagrants from gaining entry through it to the lower level of the LIRR station building in Hempstead, New York. Sparks from Marchica's welding torch caused the debris and leaves at the bottom of the shaft to smolder. In attempting to remove the debris, Marchica's hand was punctured by a bloody hypodermic syringe. Marchica had to forcibly withdraw the syringe from his palm.

In fear of having been exposed to the HIV virus, Mr. Marchica sought diagnostic testing and received counseling from a psychologist and psychiatrist. He developed rashes, suffered from nausea, sleeping disorders and dizziness, all symptoms of AIDS. It was not until

the trial, approximately 3½ years after the accident that Marchica discovered for certain that he did not contract AIDS. During the 3½ year period, he lived with the constant fear that he was going to die, leaving behind his wife and children. The health care providers concurred that Marchica sustained emotional distress, specifically diagnosing his condition as severe post traumatic stress disorder. He was treated with Prozac and continued counselling. Marchica sued under the FELA for negligent infliction of emotional distress based upon the fact that he was clinically diagnosed as suffering from the permanent condition of post traumatic stress disorder.

At the close of discovery the LIRR moved for summary judgment contending that mental distress claims were not actionable under the FELA and that plaintiff could not prove he had been exposed to the HIV virus. The District Court denied the motion for summary judgment and allowed the case to proceed to trial.

At trial, the jury rendered a verdict apportioning 55% of the fault to Marchica, 45% to the LIRR, and awarded Marchica $225,000 for past emotional distress and $55,000 for future emotional distress. Based on the apportionment, judgment was entered on May 4, 1993 in the amount of $126,000.00.

The LIRR appealed to the Second Circuit Court of Appeals. The LIRR based its appeal on several theories, including: 1) that proof of exposure to a disease is a prerequisite in fear of disease cases; 2) plaintiff did not exercise due diligence in informing himself about the disease; 3) public policy in preventing a flood of similar cases; and 4) that an award for future damage was improper.

By opinion dated July 29, 1994, the Second Circuit Court of Appeals unanimously rejected all of the LIRR's

arguments. Relying on *Consolidated Rail Corp. v. Gottshall,* No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994) ("*Gottshall*") the Second Circuit found that Marchica had met the zone of danger test established in *Gottshall.* The Second Circuit distinguished the body of case law requiring proof of exposure to a disease for two reasons: 1) Marchica was physically injured thereby assuring "genuineness" of his claim; and 2) there is support in the case law for the theory that proof of exposure is not required and the liberal interpretation of FELA requires deference to that body of law.

Petitioner bases the instant appeal on two of the exact same theories it used in the court below. The principal theory of petitioner is that the courts should apply the more restrictive body of case law developed in fear of disease cases. The second theory is that affirmance of the Second Circuits's opinion would expose rail carriers to a flood of lawsuits. In making this argument, the petitioner asks this court to ignore the zone of danger requirement established in *Gottshall,* disregard the body of case law permitting recovery in fear of disease cases without proof of exposure, and disregard the fact that plaintiff's award was based on the clinical diagnosis of post traumatic stress disorder.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the district court's interpretation of *Gottshall.*

II. Petitioner's "floodgates" theory is disengenuous based on the remedial purpose of the FELA and totally unbased in reality.

REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The Court below properly adhered to both the letter and spirit of the Statute (FELA) as most recently construed by this Court in *Consolidated Rail Corp. v. Gottshall,* No. 92-1956, 62 U.S.L.W. 4609 (June 27, 1994).

The Court below did not decide this case until *Gottshall* was decided and obviously was diligently conforming to the standard established by this Court. Further, the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.

I.

THE SECOND CIRCUIT IN ITS OPINION RELIED ON THE STANDARD ESTABLISHED BY THIS COURT IN GOTTSHALL.

The Second circuit's decision in this case conforms to this Court's holding in *Gottshall.* The decision of the court below was issued after *Gottshall* and clearly relies on the standards established in that case.

Petitioner's brief glaringly fails to mention the actual holding in the *Gottshall* case. Petitioner bases its entire brief on the same argument it attempted in front of the Second Circuit. That is, the more restrictive body of case law developed in fear of AIDS cases should be adopted for FELA cases. In doing so, petitioner fails to analyze *Marchica* according to the standards established in FELA cases in general, and specifically in *Gottshall.*

In *Gottshall,* this court adopted the common law "zone of danger" test for FELA cases, reasoning

> that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Railroad employees will thus be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. (Pet. at 52a).

The "zone of danger" test

> limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot" (Pet. at 43a).

John Marchica was not only threatened with physical impact, he was physically injured by the puncture of his palm with a bloody syringe. As a result of this puncture and its attendant circumstances, Mr. Marchica developed post traumatic stress disorder, a permanent psychiatric injury. Given the fact that Marchica was physically injured, the Second Circuit concluded that the "zone of danger" requirements were met.

Furthermore, the Second Circuit distinguished the *Marchica* case from the rules regarding "fear of future diseases". To quote the Second Circuit, "Since Marchica suffered an actual physical injury, the rule governing fear of future disease is inapposite and the traditional negligent infliction of emotional distress analysis applies." That analysis was performed by the Second Circuit under the "zone of danger" test adopted in *Gottshall.* Accordingly, petitioner's writ should be denied.

II.

THE "FLOODGATES" ARGUMENT PRESENTED BY PETITIONER IS UNBASED IN FACT AND IS CONTRADICTORY WITH THE REMEDIAL PURPOSE OF THE FELA.

It is utterly disingenuous of appellant to attempt a public policy type argument in this case. It is an historical fact that the FELA was enacted to afford maximum protection to railroad employees, the danger of whose employment is legendary.

Appellant's position is in direct contradiction with the intent of the drafters of the FELA and its interpretation in a long line of Supreme Court cases. *See, Urie v. Thompson,* 337 U.S. 163 (1949). This court has "liberally construed FELA to further Congress' remedial goal." *Gottshall,* pet. at 37a.

According to Appellant, the consequence of affirming the Second Circuit's opinion would be an unstoppable deluge of "fear of AIDS" cases by railroad employees. It has been almost two years since the district court rendered its decision permitting Marchica's case to proceed to trial. The case was widely reported yet the appellant has failed to offer any proof that the "floodgates" have indeed opened in the past two years.

Given the unique circumstances of the *Marchica* case, it is highly unlikely that the Second Circuit's opinion will lead to the epidemic of suits predicted by petitioners. Several factors combined to create the situation in which Marchica was permitted to recover. First, the LIRR failed to inspect and maintain the area in which the plaintiff was injured. Second, the defendant sent plaintiff into an area frequented by drug users and littered with drug paraphernalia, such as needles and crack vials. Third, plaintiff was stuck with a bloody

needle which became impedded in his palm. Fourth, the LIRR's medical staff discarded the needle before testing it. Thus it was impossible for Mr. Marchica to know whether or not he had been infected by the HIV virus. He was forced to wait years before his doctors were able to tell him that he had not contacted the deadly disease. If an appellant feels that this situation could be repeated thousand of times perhaps it should consider the remedial purpose of the FELA and clean up its stations.

The Second Circuit carefully followed the standards established in *Gottshall* in rendering its decision. The peculiar circumstances of the *Marchica* case will give the case little precedential value.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH P. ALTIER
PHILIP P. VOGT
(Counsel of Record)
ALTIER & BARASCH
450 Seventh Avenue
New York, New York 10123
(212) 564-9090
Attorneys for Petitioner.

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